United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1035

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P/S

To be argued by
STEVEN K. FRANKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1035

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK ELIANO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Frank Eliano appeals from a judgment of conviction entered on December 5, 1974, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 267, was filed in four counts on March 18, 1974. Counts One through Three charged Eliano with attempted evasion of his personal income tax for the calendar years 1968, 1969, and 1970, respectively, in violation of Title 26, United States Code, Section 7201. Count Four charged Eliano with failure to file an individual income tax return for the calendar year 1970, in violation of Title 26, United States Code, Section 7203.

Trial commenced on December 2, 1974, and concluded on December 4, 1974, when the jury found Eliano guilty on all counts.

On January 10, 1975, Judge Tyler sentenced Eliano to concurrent terms of three years imprisonment on each of the first three counts plus a term of six months imprisonment on Count 4 to run consecutively with the concurrent terms on Counts 1, 2 and 3.

Eliano is serving his sentence.

Statement of Facts

The Government's Case

The Government proved at trial that Eliano earned over $32,000 in taxable income during the calendar year 1968, and reported taxable income in the amount of approximately $2,100 in that year; that he earned over $90,000 in taxable income in 1969 and reported taxable income in the amount of approximately $5,100 and that he earned over $49,000 in taxable income in 1970, but failed to file an income tax return for that year after having twice requested extensions of time to file his 1970 return with the Internal Revenue Service. The Government's proof in this case showed that the source of Eliano's unreported income was the earnings of two prostitutes for whom he acted as their pimp.

(a) *Proof of Receipt of Income.* Frances Bak testified that she met Frank Eliano in December, 1968, in a midtown Manhattan Coffee Shop. After spending a few days at Eliano's home, the 17 year-old Bak was told by Eliano that in order to stay she would have to begin sleeping with men for money (Tr. 218-19).* Bak worked

* "Tr." refers to pages of the trial transcript; "GX" refers to Government Exhibits in evidence; "Br." refers to Appellant's Brief.

as a prostitute seven nights per week for approximately eight months beginning December, 1968, giving all of the proceeds of her prostitution, less cab fare and minor expenses, to Eliano, who held himself out as a Mafia member threatening Bak with death should she fail to work for him (Tr. 220). Bak further testified that during that period she earned $20,000-$25,000, that Eliano himself had kept the records of her income, and that he gave her those figures (Tr. 225).

Sandra Marchand testified that she met Frank Eliano in 1967 through a friend at a discotheque, after which she and Eliano dated for a time (Tr. 283-84). Thereafter, Eliano introduced her to a man with whom she had sexual intercourse for $50 (Tr. 287-90). Eliano later took her on trips to Miami and Puerto Rico, during which she engaged in acts of sexual intercourse with men who, in turn, paid Eliano for her services. Marchand explained that she made between $200 and $300 per night working seven nights per week during 1968, and was either kept on the street until 4:00 A.M. or beaten by Eliano on nights when she failed to earn the necessary amounts. In exchange for turning these large sums over to Eliano, Marchand lived with Eliano who paid the rent and fed her (Tr. 297-98), as well as paid her fines and attorneys' fees when she was arrested (Tr. 279). In all, Marchand explained that she worked for 2½ years for Eliano until October, 1970, always giving all of her income from prostitution to Frank Eliano (Tr. 302).

Arlyne Segal, a court reporter who works in the Supreme Court of the State of New York, New York County, testified that on May 31, 1972, she transcribed a plea of guilty by Frank Eliano, the defendant, to the crime of attempting to promote prostitution in the second degree, under the Second Count of Indictment 3507/71.

Bryan Barnett, an Assistant District Attorney in New York County, identified indictment 3507/71 (GX 1), the second count of which charged that Frank Eliano on or about February 15, 1969, advanced prostitution by compelling Sandra Marchand, by force and intimidation, to engage in acts of prostitution.

Charles Hornecker testified that for 27 years he has worked for the South Brooklyn Savings Bank on 34th Street and Lexington Avenue, and at time of trial he was a manager at the bank. Hornecker, reading from bank records (GX 91), related that for the 1970 calendar year, earned interest in the amounts of $182.61, $185.35, and $188.13 had been quarterly paid to an account which had been opened on April 6, 1970, with an initial deposit of $12,174.86. That account was opened by Frank Eliano in trust for Sandra Marchand (Tr. 115-16).

(b) *Proof of Willfulness.* The Government proved at trial that throughout 1969 Eliano misrepresented his employment status on various application forms.

Mrs. Barbara Wilkinson testified that while employed in November, 1969, as a rental agent for a luxury high-rise apartment known as the Murray Hill House, located at 132 East 35th Street, New York, Frank Eliano came to her and completed an application for an apartment (GX 8). On the application Eliano listed his employer as P & R Meat Corporation—and claimed to be earning a salary of $500 per week (Tr. 272).

Donald Nelson testified that he was a retail salesman for the Cadillac Division of General Motors in Manhattan and that during the latter part of January, 1969, Frank Eliano completed and signed a company application required prior to authorizing the sale of an automobile. On the application Eliano listed his employment as a hairstylist and manager of Tony and John's Beauty Salon,

located at 1301 Avenue J, Brooklyn, and owned by Gabriel Borgo (Tr. 65). Eliano further indicated on the form that he had been so employed for a period of two years.

Gabriel Borgo testified that he is the owner of Tony and John's Beauty Salon on Avenue J, in Brooklyn and that Frank Eliano is his first cousin (Tr. 61). Borgo explained that for the years of 1966-68, he and Eliano worked together at a place called Debutante Beauty Salon in Lynbrook, New York, and Borgo added that Frank Eliano had never at any time worked for or with him at Tony and John's (Tr. 61, 80).

Harry Nemerov, a certified public accountant for 38 years, testified that he had known Frank Eliano for a period of twelve years, and that he prepared Eliano's tax returns for years of 1968 and 1969. Nemerov further testified that the figures which he used in computing the returns were all supplied by Eliano by telephone or in conversation, and that apart from certain sales and broker's slips reflecting various stock transactions, all of the figures used were given orally by Eliano. He added that according to Eliano's figures Eliano had a gross income in 1968 of $5,558, and a taxable income of $4,986. For 1969, Eliano had told Nemerov that his gross income was $11,329.51, with a net income of $8,336.68 after expenses, for which Nemerov computed a tax liability of $1,564.13 for Eliano in that year (Tr. 171-73).

(c) *Failure to File.* Eileen Slattery testified that she is employed by the Internal Revenue Service as a supervisor at the Brookhaven Service Center. She further testified that after thoroughly searching agency files for records of Frank Eliano for the 1970 tax year, she discovered two requests from Eliano to extend the period for filing his 1970 return, but that there was no record of Eliano having filed his return for the calendar year ending December 1970 (Tr. 37-40).

The Defense Case

Teresa Liberi, Eliano's sister, testified that her husband has for 12 years owned Garden City Hair Stylists in Garden City, New York. She added that she knew Sandra Marchand and that Marchand visited her often and had dated her brother Frank from 1966-68, with Marchand frequently bringing her son along to visit. In response to questions regarding Eliano's finances, Liberi testified that her mother, Filomena Eliano, frequently gave large sums of money to Frank (Tr. 503-13).

Filomena Eliano testified that she met Sandra Marchand in 1968 through her son. Mrs. Eliano explained that at one point, when Marchand was ill, she stayed at Mrs. Eliano's home for a two week period. In addition, Marchand frequently brought her son Eric with her during visits. Regarding her finances, Mrs. Eliano testified that in 1968 she believes she gave Frank a total of $15,000 for his personal use, $13,000 in 1969, and $20,500 in 1970 (Tr. 514-27). The bankbook which purported to corroborate her testimony was entitled "Filomena Eliano in trust for Teresa Liberi" (Tr. 527).

ARGUMENT

POINT I

The District Court properly admitted evidence of Eliano's prior guilty plea to a New York State charge of promoting prostitution in the second degree.

Eliano contends that the District Court erred in permitting the Government to offer into evidence his 1972 guilty plea to a New York State charge of promoting prostitution in the second degree. The argument is without merit, since the challenged evidence was relevant and probative with respect to the source of Eliano's unreported income and the jury was properly cautioned by the trial judge on the limited purpose for which it was received.

The law is settled in this Circuit that "evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, Dkt. No. 74-1847 (2d Cir., January 10, 1975), slip op. 1231 at 1241; see also *United States* v. *Gerry*, Dkt. No. 74-2100 (2d Cir., March 28, 1975), slip op. 2583 at 2599; *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, as *Santiago* v. *United States*, 415 U.S. 976 (1974); *United States* v. *Vario*, 484 F.2d 1052, 1056 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *United States* v. *Warren*, 453 F.2d 738, 745 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Keilly*, 445 F.2d 1285, 1288 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966).

The facts proved by the evidence of Eliano's guilty plea were unquestionably relevant, since they established by Eliano's own admission that on February 15, 1969, he had caused Sandra Marchand to engage in acts of prostitution. The challenged evidence thus served to corroborate Marchand's testimony, and constituted irrefutable proof that Eliano had been engaged in the enterprise from which the Government claimed he had derived his unreported income during the indictment period.

Furthermore, in his charge to the jury, Judge Tyler gave a proper cautionary instruction to the jury on the limited purpose for which this evidence was received:

> ". . . I do ask you, however, to keep in mind one thing, and you have heard this before, but I should repeat it in my own words, which is what I ask you to accept: Please keep in mind that Eliano is not on trial here for pimping or causing persons to go into prostitution, or for assaulting anybody or any other crime than tax evasion and failure to file a tax return. You understand that.
>
> Further in this regard, you will recall that the Court permitted the prosecution to put into evidence defendant's plea of guilty to the second count of an indictment in the Supreme Court of New York, New York County, wherein essentially Mr. Eliano was charged and pleaded guilty to a Class E felony of causing Sandra Marchand to engage in acts of prostitution.
>
> Now, the only possible relevance of this evidence is to show, assuming that you accept it as true and correct evidence, that in fact Mr. Eliano has admitted in another court that he was engaged in the business of causing a woman to engage in prostitution.

> It is not admissible for showing that somehow Eliano was guilty of these charges simply because he has admitted another crime in another court. The latter is certainly not the point at all, and I am sure you will understand me when I instruct you to that end. . . ." (Tr. 576-77).

The cautionary instruction amply protected Eliano against any possible prejudice which, in this case, was minimal at most since the jury was already well aware, through the testimony of Marchand and Bak, that Eliano was a pimp. See *United States* v. *Gerry, supra*, slip op. at 2599; *United States* v. *Colasurdo*, 453 F.2d 585, 591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Klein*, 340 F.2d 547, 548-49 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965).

Eliano argues that the prosecution is forbidden to prove a relevant prior offense by introducing the defendant's conviction thereof or, as here, his plea of guilty. This contention is plainly incorrect. If evidence of a prior offense is admissible, it is perfectly proper to establish the commission of the crime by offering proof that the defendant was convicted thereof or pled guilty, since a guilty plea is a binding judicial admission of the facts admitted therein. See Rule 803(22), Fed. R. of Evid. (effective July 1, 1975); *Twentieth Century-Fox Film Corp.* v. *Lardner*, 216 F.2d 844, 850 (9th Cir. 1954), *cert. denied*, 348 U.S. 944 (1955). Proof of a relevant prior offense by showing that the defendant has been convicted of that offense has been permitted in this Circuit and elsewhere. See, *e.g.*, *United States* v. *Vario, supra*, 484 F.2d at 1054-55; *United States* v. *Guidarelli*, 318 F.2d 523, 524-25 (2d Cir.), *cert. denied*, 375 U.S. 828 (1963); *United States* v. *Olsen*, 487 F.2d 77, 79-80 (8th Cir. 1973), *cert. denied*, 415 U.S. 993 (1974); *United States* v. *Long*, 483 F.2d 1390, 1391 (5th Cir. 1973) (per curiam).

Appellant also suggests that it was unnecessary for the Government to prove the prior guilty plea because it was cumulative of the testimony of Marchand and Francis Bak, the two prostitutes who worked for Eliano. Having vigorously attacked their credibility below, appellant is in no position to complain that the Government sought to corroborate the testimony of these two witnesses with the best evidence available, namely, Eliano's admission when he pleaded guilty.

POINT II

Eliano's state indictment was not read by the jury and no prejudice occurred.

Only Count Two of the New York State court indictment was admitted in evidence (Tr. 424). All of the exhibits, including the entire state indictment, were submitted to the jury when they began their deliberations (Tr. 582). It appears from the record, however, that no juror ever saw the entire indictment. Furthermore, the district judge gave the jury a supplemental cautionary instruction which, together with his original limiting instructions, cured any possible prejudice.

The jury retired to deliberate at 4:45 P.M. on December 5, 1974 (Tr. 582). At 6:00 P.M. the jury sent their third note (Court Ex. 3) to the district judge which reads as follows:

> "May we have the exact wording of indictment to which Eliano pleaded guilty, New York Supreme Court. Thereafter, the decision may be reached almost at once." (Tr. 588).

When Judge Tyler said that he thought *Count 2 was in evidence*, Government counsel replied, "*It* was submitted, your Honor, to the jury." (Tr. 588; emphasis added). The

record thus belies appellant's suggestion (Br. at 8 n.) that the prosecutor knew the entire indictment had been sent to the jury and was responsible for doing so.

When the jury returned to open court, the fact that they had not seen the entire indictment, which was evident from their note, was revealed in the following colloquy:

> "The Court: Ladies and gentlemen, I have your last note. My understanding of your note leads me to say that you already have the answer to this in your possession. You have, I believe, or you should have, Government's 17, which is a copy of the indictment in New York County Supreme Court, and specifically the only count which is relevant is Count 2. That is the count in the indictment. You say you don't have it?
>
> Juror No. 5: We couldn't seem to locate it, your Honor, we could go back and look." (Tr. 590).

Upon discovering that the entire indictment had been sent to the jury, Judge Tyler stated:

> "The marshal did find the exhibit 17 and the entire indictment is in there, including counts which are not relevant. *However, I see no prejudice to your client because, as you know, the jury has reported that they were not able to find it.* But since the marshals have, I will take care of that now by reading to the jury the relevant portion of this indictment." (Tr. 592; emphasis added).

Judge Tyler then instructed the jury as follows:

> "The caption is, ladies and gentlemen, "The People of the State of New York against Frank Eliano, Defendant." Count 2 reads as follows: "And the grand jury aforesaid by this indictment further accuses said defendant of the crime of promoting

> prostitution," to which, as I recall the evidence, the plea was taken to a Class E felony in this promoting prostitution in the second degree, committed as follows, and I quote, "Said defendant in the County of New York on or about February 15, 1969, advanced prostitution by compelling Sandra Marchand, by force and intimidation, to engage in prostitution." (Tr. 592).

Since the record affirmatively indicates that the jury never saw the entire indictment and since the trial court's original and supplemental limiting instructions were unexceptionable, no error was committed.

Even if there were any prejudice to Eliano from the jury's receipt of the unredacted indictment, it must be assessed in the light of the Government's case, which, as Judge Tyler observed, was supported by "proof beyond any possible doubt, let alone the legal standard." (Tr. 618). *United States* v. *Bishop*, 492 F.2d 1361, 1364-1366 (8th Cir. 1974). The receipt of the unredacted indictment by the jury clearly could have had no effect on the outcome of the case.

POINT III

I. A justice Department Attorney, assigned by an Assistant Attorney General to investigate crimes and conduct grand jury proceedings may properly appear and question witnesses before the grand jury.

On this appeal, Eliano challenges the authority of organized crime strike force attorneys to appear before and present evidence to a federal grand jury. This precise issue was raised in another case argued before this Court

on March 18, 1975. *In re Persico*, Dkt. No. 75-2030 (Smith, Timbers, *C.J.J.*, Weinstein, *D.J.*). *Persico* is *subjudice.**

The attorney here, Charles E. Padgett, falls within the terms of Rules 6(d) and 54(c), F.R.Crim.P. as a government attorney who is permitted to participate in grand jury proceedings.** He was a regular Department of Justice Criminal Division Attorney assigned to its Organized Crime Section and to its field office in New York. In this role, he operates under the supervision of the Assistant Attorney General, the Section Chief, the Deputy Section Chief and the Attorney-In-Charge of the field office.*** The latter

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* This issue also has been recently considered by a number of District Courts in this Circuit and elsewhere. *Sandello* v. *Curran*, Misc. 11-188 (S.D.N.Y., February 27, 1975); *In re Langella*, 74 Cr. 638 (E.D.N.Y., February 27, 1975); *United States* v. *Crispino*, 74 Cr. 932 (S.D.N.Y., February 13, 1975), motion for reconsideration denied, (March 26, 1975); *United States* v. *Brown*, 74 Cr. 867 (S.D.N.Y., February 24, 1975); *United States* v. *Jacobson*, 74 Cr. 936 (S.D.N.Y., March 3, 1975); *United States* v. *Lyberger*, (N.D. Ill., March 19, 1975); *United States* v. *Wiener*, 74 Cr. 336 (N.D. Ill., March 17, 1975); *United States* v. *Brodson*, 74 Cr. 98 (E.D. Wis., January 31,1975); *United States* v. *Kazonis*, 74-238-S (D. Mass., March 24, 1975).

These decisions all appear to have been spawned by the opinions of Judge John W. Oliver in *United States* v. *Williams*, 74 Cr. 47-W-1 (W.D. Mo., October 21, November 15, and December 3, 1974).

** Rule 6(d) states that "attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session." Rule 54(c) defines "attorney for the government" as including "an authorized assistant of the Attorney General" and "an authorized assistant of a United States Attorney."

*** The field offices were first established in 1966. See e.g. Annual Report of the Attorney General of the United States 1973 pp. 78-81 which gives a report to Congress about the Operation of the field office. Hearings before a Subcommittee of the Committee on Government Operations. H.R. 91st Cong., 2d Sess.,

[Footnote continued on following page]

coordinates his efforts with the local United States Attorney, who in turn generally signs applications for immunity orders and usually reviews and signs all indictments returned by the Grand Jury.

Each Organized Crime Section attorney who presents evidence before the grand jury does so only after he obtains, as indicia of his authority, a letter of authorization signed by an Assistant Attorney General and files it, along with a copy of his duly executed oath of office, with the Clerk of the District Court.* This procedure follows a long established practice in the Department of Justice. Under this practice, the letter commonly recites that the attorney, even a regular department attorney, has been "specially retained and appointed as a Special Attorney under the authority of the Department of Justice" and specially authorized and retained to conduct legal proceedings including grand jury proceedings and that the attorney is to serve "without compensation other than the compensation you are now receiving under existing appointment."** When the

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August 13 and September 15, 1970 at pp. 83-120 where Department Representatives testified about the strike force concept to a Congressional Committee. See also Note, *The Strike Force: Organized Law Enforcement* v. *Organized Crime*, 1970 Columbia Journal Law and Social Problems, 496.

* Neither a letter nor an oath is a prerequisite for a grand jury appearance by a government attorney. See *United States* v. *Morton Salt Co.*, 216 F. Supp. 250, 256 (D. Minn. 1962), affirmed, 382 U.S. 44 (1965). For example, Assistant United States Attorneys may appear before the grand jury in their home districts without letters of authorization. The oath and salary limitations of 28 U.S.C. 515(b), which is derived from the Act of June 22, 1870, discussed *infra*, apply only to the appointment of specially retained outside counsel, not officers of the Department. Prior to first entering on duty, each attorney of the Department executes the oath swearing to "faithfully discharge the duties of the office" he is about to enter.

** Anti-trust Division Attorneys generally are "specially retained and appointed under the authority of the Department of Justice" without any recitation that they are Special Attorneys.

letter makes specific mention of the particular statutes into whose violation the grand jury intends to inquire, it also commonly includes a catch-all phrase, "other criminal laws of the United States." The letter, however, may not mention any specific statute and may simply recite that the inquiry covers various criminal laws of the United States.*

The primary issue here is whether such an attorney becomes an unauthorized person before the grand jury if his appointment letter authorizes him to conduct any kind of legal proceeding including grand jury proceedings "which United States Attorneys" are authorized to conduct rather than reciting some form of limitation on the inquiry that he may conduct. Appellant contends that as Mr. Padgett in his capacity as a government attorney is an "attorney specially appointed by the Attorney General" under 28 U.S.C. § 515 he must be "specifically directed by the Attorney General" to conduct some particular inquiry before the grand jury. Our position is that Padgett may properly appear before the grand jury as a government attorney under Rule 6 and conduct an inquiry in like manner as a United States Attorney without such specific direction. We first show that this authority derives from the power of the Attorney General to conduct federal criminal litigation. We then focus on 28 U.S.C. 515, the statute considered by the district courts which have ruled against the government, and a related statute, 28 U.S.C. 543, and argue that, even under these specific statutes, the Attorney General has

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* The practice of filing a letter of authorization does not stem from any statute or regulation. However, in *May* v. *United States*, 236 F.2d 495, 500 (8th Cir. 1916), the first case to interpret 34 Stat. 816 (1906), now 28 U.S.C. 515(a), the Eighth Circuit specifically asked that copies of the letter appointing specially retained counsel and his oath of office be presented "to any court in which the assistant attorney is called upon to act." Such a filing serves the function of keeping the district courts apprised of the particular government attorney whether specially retained or a regular officer, who are appearing before its grand juries. Over the years, the letters of authorization have been modified.

power to assign a department attorney to conduct grand jury inquiries in the same manner as a United States Attorney. We next show that the Attorney General's power to assign Criminal Division attorneys to a grand jury has properly been delegated to the Assistant Attorney General in charge of that division. Finally, we contend that a grand jury witness may not complain about the scope of authority of a government attorney to conduct a grand jury inquiry.

A. The Attorney General has the power to conduct federal criminal litigation and may assign his subordinate officers to conduct a grand jury proceeding with the same wide latitude of inquiry as the grand jury itself.

It is settled law that the Executive Branch—specifically, the Attorney General—has the power to conduct federal criminal litigation including absolute discretion whether to prosecute. It is "an executive function within the exclusive prerogative of the Attorney General." *United States* v. *Cox*, 342 F.2d 167, 190 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965) (concurring opinion of Judge Wisdom).

In *Cox*, the Court further held, "The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed (*United States* v. *Cox*, *supra*, 342 F.2d at 171).

Accordingly, under the broad ambit of statutes under which the Attorney General operates, he may appoint officials "to detect and prosecute crimes against the United States," 28 U.S.C. § 533. He has supervision of all litigation in which the United States is a party and is commanded to "direct all United States Attorneys, Assistant United States Attorneys, and special attorneys appointed under section 543 . . . in the discharge of their respective duties" 28 U.S.C. § 519. He may appoint assistant United

States Attorneys in any district in which they reside, see 28 U.S.C. § 545, or "appoint special attorneys, regardless of their residence, to assist United States attorneys when the public interest so requires" 28 U.S.C. §§ 542, 543. He may direct any officer of the Department of Justice to conduct and argue any case in any court of the United States, 28 U.S.C. § 518. He also may direct "any other officer of the Department of Justice or any attorney specially appointed by the Attorney General under law . . . when specifically directed by the Attorney General" to conduct any kind of legal proceedings "including grand jury proceedings", 28 U.S.C. 515. Moreover, since 28 U.S.C. 509, deriving from the Reorganization Acts of 1949 and 1950, vests all functions of the Department of Justice, with some exceptions in the Attorney General, the statute for delegation appearing in 28 U.S.C. 510 is essential so that he may "make such provisions as he considers appropriate authorizing the performance by an officer . . . of any function of the Attorney General." See *United States* v. *Giordano*, 416 U.S. 505 (1974). On his part, the United States Attorney, an appointee of the President, has the duty "except as otherwise provided by law" to prosecute all offenses against the United States within his district, 28 U.S.C. 547.

Recently, the Supreme Court considered these principles and some of these statutes in ruling on the justiciability issue involving the Watergate Special Prosecutor and the President in *United States* v. *Nixon*, 94 S. Ct. 3090 (1974). The Supreme Court unequivocally stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute." It also pointed out that:

> Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. § 516. It has also vested in him

> the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to these statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.

Clearly therefore, the Attorney General has authority to assign other officers of the Department of Justice, not only under 28 U.S.C. 515, but also under the other statutes giving him power over criminal litigation. If it were otherwise, then his broad power to conduct criminal litigation would be seriously hampered at its inception—the initiation of a criminal case by presenting evidence before grand juries.

We have focused so far on the general authority of the Attorney General over federal criminal cases. But this power may not be considered in a vacuum. Not only may no serious criminal case be commenced without a grand jury indictment, but a grand jury itself has wide latitude to conduct an inquiry into violation of criminal laws. As the Supreme Court recently observed in *United States* v. *Calandra*, 414 U.S. 338, 343 (1974):

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedures and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable

> result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282 (1919).

Both the power of the Attorney General to designate an attorney to conduct a grand jury inquiry and the power of the grand jury to investigate would be circumscribed, despite the principles expressed in *Calandra* and *Blair*, if the Attorney General could not direct that his assigned officer could question as broadly as the scope of the inquiry. It would restrain the inquiry with a "technical procedural" rule—the scope of the authority of the Justice Department lawyer. It would mean that questions by jurors themselves outside these bounds would be out of order. It would require that the inquiry "be limited narrowly by . . . forecasts of the probable results of the investigation" despite the fact that the jury's role is to find probable cause. *United States* v. *Dionisio*, 410 U.S. 117 (1973).

Perhaps no argument speaks more clearly to the unique power vested in the Attorney General as does the holding of Judge Learned Hand in *Sutherland* v. *International Insurance Co. of New York*, 43 F.2d 969 (2d Cir. 1930). Therein Judge Hand stated: "The Attorney General has powers of general superintendence and direction over district attorneys (Title 5, U.S. Code, § 317) and may directly intervene to conduct and argue any case in any court of the United States (Title 5, U.S. Code, § 309). . . . Thus, he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they declare to press. No such system is capable of operation unless his powers are exclusive. . . . His powers must be co-extensive with his duties. And so, quite aside from the respectable authority that confirms our view, we should have had no doubt that no suit can be brought except [when] the Attorney General, his subordinate, or a district attorney under his 'superintendence and direction', appears for the United

States." (*Sutherland* v. *International Insurance Co. of New York*, *supra*, 43 F.2d at 970-71). We submit, therefore, that the Attorney General's power to assign attorneys to a grand jury inquiry is of necessity as broad as the inquiry itself or, in other words, as broad an inquiry as "United States Attorneys are authorized by law to conduct."

B. Apart from other statutes, the plain language of 28 U.S.C. 543 and 28 U.S.C. 515 gives the Attorney General power to assign government attorneys to conduct any kind of legal proceedings which United States Attorneys are Authorized to conduct.

Turning from the broad statutory framework under which the Attorney General conducts the criminal litigation of the United States and focusing on the statutes to which the recent decisions of the district courts have directed their attention, 28 U.S.C. 515 and 543, the plain language of these statutes show that the Attorney General has the power to assign an attorney of the Department of Justice to conduct a grand jury inquiry with the same breath as an inquiry conducted by a United States Attorney.

1. Section 543 gives the Attorney General power to appoint "attorneys to assist United States Attorneys when the public interest so requires." This grant of power is similar to his authority under section 542 to appoint Assistant United States Attorneys "when the public interest so requires." Neither statute contains any words of limitation on the power of these appointees to conduct criminal proceedings, including grand jury proceedings. We are aware of no authority that suggest that an Assistant United States Attorney cannot conduct a broad grand jury inquiry by virtue of his office. A departmental or special attorney appointed under section 543 would likewise be subject to no limitation. We submit that the letter of appointment of Mr. Padgett can reasonably be read to be an appointment under this section.

There remains the question of whether the organizational structure of the organized crime strike forces precludes a conclusion that its attorneys were appointed to "assist" the United States Attorney. In our view, a finding that they are endeavoring to investigate and prosecute "organized crime" in a particular district constitutes assistance to the United States Attorney for that district. In any event, whereas the United States Attorney reviews and signs all indictments and the organized crime prosecutions are coordinated with him, it is clear that the attorneys of the strike force are "assisting" the United States Attorney.

In short, as Judge Frankel observed in *United States* v. *Jacobson*, *supra* (slip opinion pp. 3-4):

> Judge Judd in *United States* v. *Albanese*, 74 Cr. 69 (E.D.N.Y.), noted the broad authority of the Attorney General under 28 U.S.C. §§ 542 and 543(a) to appoint Assistant United States Attorneys and "attorneys to assist United States Attorneys" all over the country. The thrust of this statutory framework is against the straitened and sharply technical view urged by our movant. The head of a Department for a nation of over 213,000,000 people ought not to be required, either personally or through the Presidential appointees in his sub-cabinet posts, to appoint attorneys, one by one for specific cases. To be sure, large powers may be abused. Equally surely, and sadly, monstrous abuses have lately happened. But we must go on. It will not do for the judges to strain for grammatical traps to find violations of the Congressional will where (a) the statutory text compels no such finding, (b) the Congress is entirely content with the questioned action and could otherwise readily stop it, and (c) the result of the technical obstruction would be at best a temporary drag upon enforcement of the criminal law.

2. Section 515(a) provides that the "Attorney General or any officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceedings is brought." The language of Section 515(a) thus expressly provides that an attorney may be "specifically designated" to conduct "any kind of legal proceedings . . . which United States attorneys are authorized by law to conduct", and the letters of authorization in question expressly state the attorney is "specifically authorized and directed to file informations . . . and to conduct . . . any kind of legal proceedings . . . including grand jury proceedings . . . which United States Attorneys are authorized to conduct." The plain meaning thus permits the Attorney General to give the assigned attorney a specific direction to conduct grand jury proceedings like the United States Attorney. Upon this basis, alone, the letter of authorization was sufficient.

However, even if the words "specifically directed" are read to require a specific limitation in the proceedings to which a special attorney is assigned, as the district court concluded in *Crispino*, *supra*, it does not follow that this construction is applicable to regular attorneys of the Department of Justice. The statute applies to three categories of attorneys, the Attorney General, any officer of the Department of Justice, and an attorney specially appointed by the Attorney General. The phrase "specifically directed" obviously does not apply to the Attorney General himself. Since section 510, permits him to delegate this power to other officers of the department, there is no reason to read section 515(a) to make the phrase "specifically directed" apply to "any officer of the Department of Justice". In

other words, if "specifically directed" is a limitation, it should be read to be applicable in the words of the statute only to "any attorney specially appointed by the Attorney General under law (who) may, when specifically directed conduct any kind of legal proceeding." Again under this reading, Mr. Padgett had legal authority to conduct a broad grand jury inquiry. As a regular attorney in the Department of Justice, he qualifies under common usage as an officer of the Department of Justice. See e.g. the use by the Supreme Court of that term in *United States* v. *Giordano*, *supra*, and the discussion of the 1870 Act creating the Department of Justice, *infra*.

In sum, as Judge Pollock construed this section in *United States* v. *Brown*, *supra*, slip opinion pp. 12-13:

> "Since the statute does not confine its application to particular facts or particular defendants, it would appear appropriate for the Courts to implement the public policies to be served through Strike Forces by upholding a broad grant of authority and to sustain a commission that directs members of the specially selected Strike Force to prosecute any kind of legal proceeding. Indeed to hold that such commissions are insufficiently specific would not serve any public purpose but might have mischievous and drastic effects as a precedent against the current needs of law enforcement across the county. No fundamental rights are at stake here that need be conserved in the constitutional interests of criminal targets. There is a strong public interest in implementing the broad purposes of the Congress and the executive by upholding the authority of the special prosecutors of the Strike Force.

Or, as Judge Frankel observed in *Jacobson*, *supra slip opinion* pp. 2-3:

> "As has been shown in the several opinions recently announced, the plain language of 28 U.S.C. § 515 is

comfortably read to validate the questioned appointments of special attorneys. The special attorney involved here received a letter of authority which, in literal terms, "specifically directed * * * (the) conduct (of) any kind of legal proceeding, civil or criminal, including grand jury proceedings * * *." There is, to be sure, arguable ground for a contrary view. However, where the question is one of asserted deviation from the command of Congress, it is a matter of at least some significance that the appointment and widespread employment of Strike Force attorneys has been one of the most publicized activities of the Department of Justice during the last decade. Reports of the Attorney General have, as Judge Werker noted repeatedly highlighted these activities. Congress has been made clearly aware of the enterprise—through specific discussions at committee hearings as well as other means. The national operations of Strike Force attorneys have been funded without apparent question and with no intimation of doubt as to the authority on which these efforts were proceeding. "The repeated appropriations * * * not only confirms (*sic*) the departmental construction of the statute, but constitutes (*sic*) a ratification of the action * * *." *Brooks* v. *Dewar*, 313 U.S. 354, 361 (1941) (footnote omitted). See also *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116 (1947); *Isbranetsen-Moller Co.* v. *United States*, 300 U.S. 139, 147 (1937); *Holtzman* v. *Schlesinger*, 484 F.2d 1307, 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Orlando* v. *Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971)."

Moreover, as the Court noted in *United States* v. *Brown*, *supra*, slip opinion pp. 9-10:

"The statutory requirement of a specifically directed authorization was apparently enacted in an atmos-

> phere of the appointment of individual special prosecutors with particularized experience for particular cases. But this should not be and has not been interpreted as a requirement to thwart the comprehensive sweep of the statutory language, which was to facilitate the government's prosecutorial efforts, when unleashed by the Attorney General to deal with rackets and organized crime through an elite corps of the government's prosecutors."

Finally, in *Brown*, *supra*, slip opinion p. 14, Judge Pollack citing *Haberman* v. *Finch*, 418 F.2d 664, 666 (2d Cir. 1969) noted:

> "It is a familiar maxim of statutory interpretation that Courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation".

The Government respectfully submits that the scope of Mr. Padgett's authority is not regulated or governed by his letter of authorization, which the Government contends is merely indicia of his authority, but rather by his superiors—including the Attorney General—in the Department of Justice. In *Sullivan* v. *United States*, 348 U.S. 170 (1954) the United States Attorney had presented evidence relating to violations of the Internal Revenue Code to a grand jury without having first obtained authorization to do so from the Attorney General, as he was required to do by an Executive Order issued by the Attorney General. The grand jury filed an indictment. On appeal the failure of the United States Attorney to comply with the provisions of the Executive Order was asserted as grounds for dismissal of the indictment. In rejecting this claim the Court held at 173-74:

> "The evidence was presented by the District Attorney, who was a representative of the Department of

> Justice, notwithstanding that he failed to comply with the departmental directive. For this he is answerable to the Department, but his action before the grand jury was not subject to attack by one indicted by the grand jury on such evidence."

Indeed, in construing the purport of the Executive Order the Supreme Court noted that its purpose was to transfer responsibility for tax prosecutions to the Department of Justice and was not intended to direct how such responsibility should be exercised. By the same token it is submitted that Congress in enacting 28 United States Code § 515(a), and the other relevant statutes cited herein, merely defined the scope of the inherent power of the Attorney General as the Chief Executive of the Department of Justice and did not manifest any intent to direct how this power or responsibility was to be exercised. Thus, where a departmental or special attorney exceeds his authority, it is submitted that the matter is one which should more properly be considered by the Department of Justice rather than by the Courts.

C. The legislative history of 28 U.S.C. 515 does not undermine the broad statutory authority granted to the Attorney General to conduct the criminal litigation of the United States.

We believe that the plain wording of the statute does not require resort to the legislative history of section 515. However, we shall consider that history in light of the fact that it was the prime basis for Judge Werker's conclusion in *United States* v. *Crispino*, *supra*, that the Attorney General has no power to give blanket authority to a Department of Justice attorney to conduct a grand jury inquiry in a particular judicial district. This history neither undermines the plain wording of this statute nor the broad statutory authority granted to the Attorney General to conduct criminal litigation. Rather, the history of the 1906 Act,

from which section 515 originated, shows its purpose was to expand instead of contract the right of the Attorney General and his subordinates to conduct grand jury proceedings.

1. *The 1861 and 1870 Acts.* These two acts serve as a background to our consideration of the 1906 Act. In the Act of August 21, 1861, 12 Stat. 285, Congress provided that the Attorney General of the United States was "charged with the general superintendence and direction of the District attorneys . . . as to the manner of discharging their respective duties." He was also "empowered, whenever in his opinion the public interest may require it, to employ and retain (in the name of the United States) such attorneys and counselors-at-law as he may think necessary to assist the District Attorney in the discharge of their duties and shall stipulate with such assistant counsel the amount of compensation". The latter section which has remained substantially unchanged is now codified as 28 U.S.C. 543(a).

The Act of June 22, 1870, 16 Stat. 162, which created the Department of Justice resulted in large measure out of abuses in the employment of outside counsel, including the payment of excessive fees and the sometime inferior quality of their services.* This legislation in section 5, 16

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* See, *e.g.*, the following passages from the Congressional Globe:

> This bill . . . put an end to a system which might be perverted to purposes of favoritism.
>
> Under various laws, and sometimes, perhahps, without any very definite law, a practice has grown up largely since 1860 of giving employment to counsel for the Government in almost every conceivable capacity and under a great variety of circumstances—to counsel who are not officers of the Government, nor amenable as such. Under appropriations for collecting the revenues, and other general purposes, very large fees have been paid for services which could have been performed by proper law officers at much less expense.
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> * * * * *

[Footnote continued on following page]

Stat. 163, consolidated in a single department the regular salaried staff of government officers, who were empowered to attend to the interests of the United States "in any suit pending . . . or to attend to any other interest of the United States" under direction of and on behalf of the

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The contingent funds of the Departments are now sometimes used to employ counsel. And in all the forms and under whatever authority counsel are employed there is now no limit on the fees that may be paid and none of the sanctions of official authority. Cong. Globe, 41st Cong. 2nd Sess. 3038 (1870): House debates).

One of the objects of this bill is to establish a staff of law officers sufficiently numerous and of sufficient ability to transact this law business of the Government in all parts of the United States. Id. at 3035.

* * * * *

Retainers of $3,000 and $7,500 have been sent to counsel in other parts of the United States. Some have rendered service, and some we cannot find rendered any at all . . . Id. at 3038-3039.

* * * * *

the design (of the bill) is to prevent the appointment of those who are not responsible men—that is, officers for temporary duties, and whose charges are in excess of the fees paid to regular officers in the way of salary. . . . The real object of this bill, to diminish the expense which the Government of the United States is now at for temporary legal assistants, and to substitute therefor a class of officers on fixed salaries who shall be regulated by law. I take it for granted, considering the highly respectable and discreet source from which this bill originates, that the object of the bill is retrenchment. The object of the bill is the prevention of what I may call the sporadic system of paying fees to persons, not to speak disrespectfully of them, who may be called departmental favorites. It is to regulate that which I think is an abuse. * * * *

In case [special] deputies are absolutely needed . . . they are to have a special commission, and to act under the Attorney General. Id. at 4490 (Senate debates)

Attorney General.* With respect to the future expenditures for retention of outside (non-Department of Justice) counsel, to "assist in the trial of any case", Section 17 provided (16 Stat. 164) that the need for such counsel was to be publicly stated prior to their employment, and the scope of their commission was not to exceed this stated need:

> . . . no counsel or attorney fees shall hereafter be allowed to any person or persons, for services in such capacity to the United States, or any branch or department of the government thereof, unless hereafter authorized by law and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, *or the officers of the department of justice, or by the district attorneys.* And every attorney and counsel [1] or who shall be specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the government is interested, shall receive a commission from the head of said Department as a special assistant to the At-

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* In specific terms, Section 5 provided that:

> . . . the Attorney General may, whenever he deems it for the interest of the United States, conduct and argue any case in which the government is interested, in any court of the United States, or may require the Solicitor General or any officer of the Department of Justice to do so. And the Solicitor General, or any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, *or to attend to any other interest of the United States; for which service they shall receive,* in addition to their salaries, their actual and necessary expenses, while so absent from the seat of government, the account thereof to be verified by affidavit. (Emphasis added).

> torney General, or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon such officers by law (Emphasis added).

In the Congressional debates, it was made clear that the Attorney General would be held responsible for the special need to expend funds to retain outside counsel and for the quality of their performance.* This was to be accomplished by requiring that the need for outside counsel and the purposes for which he was retained be specified on the face of each special commission "in order that [counsel] may be responsible to him [the Attorney General] and to the government for the performance of their duties".** Thus, Congress in establishing the Department

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* "There will of course have to be employed some special assistants . . . they will be appointed by *special commission*, receiving a fee to be agreed upon or determined by the Attorney General, and by him alone, and which in no case will exceed the compensation properly allowable for the service rendered."

* * * * *

If the Attorney General cannot try the case and the emergency requires assistant counsel, he can employ [outside counsel]. It is then done by the head of the law department. . . . He is responsible as the chief law officer of the Government. If any error is committed we shall know who is chargeable with it. We have then the assurance, if he be the proper person, that the office will be administered economically. Congressional Globe, supra at 3036-3037.

** These remarks came from the following statement in the Congressional Globe, *supra* at 3035:

> ". . . if the Attorney General, under the authority given him by existing law, shall employ assistant counsel in any district he shall designate those counsel as assistant district attorneys or assistants to the Attorney General, and give them commissions as such *in the special business with which they are charged, in order that they may be respon-*

[Footnote continued on following page]

of Justice showed no concern that its employees would interfere with the functions of the District Attorneys and gave the Attorney General power to use the persons he employed to attend to any interest of the United States. The primary Congressional concern was that the commissions be granted to outside counsel employed by the Attorney General so that their responsibility to the Attorney General would be clearly evidenced.

2. *The Rosenthal, Cobban and Twining cases.* Three district court cases also are a background to consideration of the 1906 Act.

In *United States* v. *Rosenthal,* 121 Fed. 862 (C.C.S.-D.N.Y., 1903), the district court, proceeding on what we view to be a variety of erroneous premises, dismissed an indictment because a specially retained "assistant to the Attorney General became in fact the chief officer in the conduct of the investigation before the grand jury..." 121 Fed. 872. The district court's premises were that: (1) the *Confiscation Cases,* 74 U.S. 454, 457 (1868) held that the Attorney General and his officers had no power over any case or authority to appear before a grand jury in a criminal proceeding until after indictment despite the various statutes giving the Attorney General power over "cases in any court" and "any other interest of the United States"; (2) the statute empowering the appointment of special attorneys only authorized them "to assist in the trial of any case"; and (3) officers of the Department of Justice were limited to persons appointed by the President and with the advice or consent of the Senate.

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sible to him and to the Government for the performance of their duties. The committee have been convinced most thoroughly by our investigations that no person should be charged with the conduct of litigation in behalf of the United States unless he holds a commission under the United States and is responsible to the law and the proper authorities." (Emphasis added).

However, the issue decided in the *Confiscation cases* was that an Attorney General could dismiss a forfeiture suit over the objection of an informer. The facts thus do not involve, and the opinion does not discuss, the relative rights of the Attorney General vis-a-vis the United States Attorneys before grand juries. On the contrary, it repeatedly paraphrases the 1861 Act which provides that the Attorney General is responsible for the general supervision and ultimate control of all the duties of the United States Attorneys.

In addition, with respect to the language in Section 5 of the 1870 act which explicitly gave the Attorney General the right to "conduct and argue any case in any court" and "attend to any other interest of the United States," 16 Stat. 163, in *Rosenthal* the court merely adhered to its erroneous interpretation of the *Confiscation Cases* and flatly rejected the language in *Councilmen* v. *Hitchcock,* 142 U.S. 547, 563 (1892) which held that a "criminal case" includes grand jury proceedings.

Finally, as for the district court's narrow interpretation of the term "officers," Section 9 of the 1870 Act, 16 Stat. 163, after listing the officers of the Department of Justice that shall be appointed with the advice and consent of the Senate, provides that "all the other officers" of the Department shall be appointed by the Attorney General.

Thereafter, *United States* v. *Cobban,* 127 Fed. 713, 717 (D. Mont. 1904), and *United States* v. *Twining,* 132 Fed. 129, 131 (D. N.J. 1904), both rejected the *Rosenthal* construction, of what is now 28 U.S.C. 543 and 515(b). *Cobban* concluded that a special assistant to the United States Attorney could properly appear before the grand jury and *Twining,* in overruling motions to quash indictments, concluded the Department of Justice could appoint a special assistant to the District Attorney under what

is now 28 U.S.C. 543 and authorize him to appear before the grand jury.

3. *The Act of June 30, 1906.* The express purpose of the bill as reflected in the House Committee report supports the Government's position (H.R. Rep. No. 2901, 59th Cong. 1st Sess. p. 1)*:

> The purpose of this bill is to give to the Attorney General, or to any officer in his Department or to any attorney specially employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.

Nor is this broad purpose limited by the other language in the report, upon which Judge Werker relied in *Crispino* in which the committee speaks of special counsel having "special fitness" to assist the Attorney General in a "special case". The statute also is not restricted by the fact that the legislation was directed at the *Rosenthal* decision.

In the first place, when the Report discussed the employment of "special counsel," it was in fact concerned only with specially retained outside counsel. This obviously is the reason that the Report repeatedly cautions the Attorney General that the expanded use of specially retained counsel should be accompanied by the appropriate justifications on the record. Apparently, this Congress,

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* The majority and minority reports of House Committee that considered the 1906 Act which became Section 515(a) are set forth in Judge Werker's opinion in *Crispino* (slip opinion pp. 8-10, Note 21 at p. V).

like the 1870 Congress, was concerned about abuses in the employment of such counsel.*

Second, the Attorney General did not request that the right to appear before grand juries be granted or restored to himself or to the other salaried officers in his regular employ. Rather as the report states:

> The Attorney General states that it is necessary . . . that he shall be permitted to employ special [outside] counsel to assist the district attorneys . . . and that such counsel be permitted . . . to appear before a grand jury either with the district attorney or alone.
>
> It seems eminently proper that such power and authority be given by law. It has been the practice to do so in the past and it will be necessary that the practice shall continue in the future. H. Rep. No. 2901, *supra* at 2.

Indeed, the minority report, which the majority did not question, recognized that the Attorney General could appear before a grand jury.** Thus, it is clear that Congress did not accept the construction in *Rosenthal*, *supra*, that the Attorney General and other officers of the Department could not participate in grand jury proceedings.

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* Specific justifications or limitations were not contained, nor found lacking, in the commission sent in *United States* v. *Crosthwaite*, 168 U.S. 375, 376, 377 (1897). There, the special counsel involved was not specially retained, but a regular salaried officer of the Department of Justice and not entitled to any extra-compensation.

** The minority report states in pertinent part:

> It seems to us that part of the bill as reported should be stricken out, especially in view of the fact that the Attorney General himself has the right in any case of sufficient importance to appear in person. H. Rep. No. 2901, *supra* at 3.

Third, the Report also states, *supra* at 2:

> The Attorney General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys *or lawyers* do not generally possess, and in cases of such usual (sic) importance to the Government, and that such counsel be permitted to possess all of the power and authority, in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone. (Emphasis added).

We submit that the other lawyers in the Department of Justice are "lawyers" referred to above. Such a reading shows that the Report acknowledged that the use of other department lawyers need not to be justified in the same manner as the use of specially retained counsel.*

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* The Senate version of the bill (S. 2969) was introduced on June 11, 1906 two weeks before the House bill (H.R. 17714) was passed and referred to the Senate. The Senate did not use the words "specifically directed by the Attorney General." See *Crispino, supra,* slip opinion Note 71. The Senate Report advised that it is frequently desirable and even necessary that the Attorney General detail an officer of the Department of Justice, or, where this is impractical, appoint a special assistant to the Attorney General, or special counsel to act independently of the United States Attorney, particularly in criminal matters and that the attorneys described in the bill should have the power to conduct proceedings before a grand jury. See, S. Rep. 3835, 59th Cong. 1st Sess. (1906). See *Crispino, supra* slip opinion, Note 17.

An earlier version of the bill (H.R. 11264) listed particular officers of the Department of Justice who could participate in grand jury and court proceedings. The fact that the bill as passed used the term "officers" rather than particular officers such as the Assistants Attorney General, is an indication that "officers" covers other attorneys in the Department of Justice.

Finally, there is no suggestion in the report that the act was intended to modify or cutback on the right of a government attorney to appear before a grand jury and participate in other proceedings under what now is section 543.

D. Under the three decided appellate cases, the government's attorney here may properly appear and question appellant before the grand jury.

The three appellate cases which have interpreted 28 U.S.C. 515 ruled that the assigned attorneys whether regular retained government attorneys or specially retained counsel could properly represent the government in the proceeding involved. The rationale of these decisions, however, has been different. But under all of the theories adopted, the government attorney here may properly appear and question appellant before the grand jury.

In *May* v. *United States*, 236 Fed. 495, 500 (8th Cir., 1916) one Robert Childs was specially retained at $25.00 per day plus expenses pursuant to a letter signed by an Assistant Attorney General, to assist in the preparation and trial "in the Eastern District of Missouri," of the so-called "Oleomargarine Cases". After stating that the 1906 Act permitted the Attorney General to retain special counsel "personally or through his lawful assistants, the court concluded (236 Fed. at 500):

> This is not a proceeding to try the title of Mr. Childs to the office of special assistant to the Attorney General for the purposes mentioned in the appointment. It is a motion to quash an indictment for the reason that an unauthorized person took part in the proceedings of the grand jury which resulted in the indictment. Such a motion only attacks the authority of Mr. Childs in a collateral way, and

> beyond all question he was a de facto officer, acting by color of authority, and his acts are valid until it is judicially declared by a competent tribunal in a proceeding for that purpose that he has no right to to the office, the duties of which he is performing.

Here, Mr. Padgett was more than a de facto officer. He was a regular Department of Justice attorney who under Judge Werker's opinion could investigate "organized crime" cases. Thus, assuming arguendo that his authority was excessive, it could not be subject to attack "in a collateral way".

In *Shushan* v. *United States*, 117 F.2d 110, 113-114 (5th Cir. 1941), *cert. den.*, 313 U.S. 574 (1941), the defendants alleged that three "special assistants to the Attorney General" participated in the proceedings before the grand jury without having been specifically directed to do so by the Attorney General. Each commission evidence the appointment of the person named as "special assistant to the Attorney General" and specifically directed him to conduct in the Eastern District of Louisiana, proceedings in which the United States was interested, including grand jury proceedings. In some of the commissions there was mention of the mail fraud statute, in which the violations are stated to have been committed by named persons "and other persons unknown." None of the commissions evidencing appointment specifically referred to any person indicted. The Court in refusing to abate the indictment on this ground concluded (117 F.2d at 114):

> We think it appears that these persons had and acted in an official status with respect to this case, and that the authority of each extended specifically to appearing in grand jury proceedings in the Eastern District of Louisiana in prosecutions under the the mail fraud statute. The mention of persons supposed to be guilty was too general to restrict the

> authority to cases against them only. When a grand jury, which is an inquisitorial body, begins an investigation it cannot be known in advance whom they will indict. . . . . The words of Section 310, "When thereunto specifically directed by the Attorney General, [to] conduct any kind of legal proceeding", *are mainly* for the protection of the United States. They do not require the naming of the persons or the particular cases to be prosecuted. Mail fraud cases in the Eastern District of Louisiana were specifically enough mentioned here, and we think it would be going too far to hold, at the instance of the accused, that the appointees were exceeding their authority in conducting this proceeding. (Emphasis supplied)

The instant case, as we have argued *supra,* clearly fits under the rationale that the inquisitorial nature of the grand jury makes it impossible for it to know in advance whom it will indict. The present letter, to be sure, is not confined to a particular character of cases such as mail fraud cases. But the same reason, the wide and broad range of the grand jury inquiry, makes it equally inappropriate in a broad inquisitorial inquiry to name the crimes under which any indictment may be brought. And, as we argue *infra*, under *Blair* v. *United States*, 250 U.S. 273 (1919), a grand jury witness is not entitled to set the limits to such an inquiry. Finally, *Shushan* involved specially retained outside counsel, rather than regular Department of Justice attorneys, and since the statute is for "the protection of the United States", the Government is in no way injured when its regular attorneys appear before a grand jury pursuant to assignment. See our discussion of the 1870 Act, *supra.*

United States v. *Hall*, 145 F.2d 781, (9th Cir. 1944), *cert. den.*, 324 U.S. 871 (1945), is the only appellate case which concerned the use of officials of the Department of Justice, rather than specially retained outside counsel.

Consequently, the opinion does not talk in terms of special commissions, oaths or salary limitations. Rather, it focuses on whether participation by officers of the Department of Justice was, in fact, authorized by the Attorney General. The Court stated (145 F.2d at 785):

> We are of the opinion and so hold that the authorization may be direct to each designated officer of the Department or it may be to an officer in immediate supervision over several other such officers and may include such authorization to any or all of the several. And we are further of the opinion and we so hold that such authorization need not be directed to specifically designated cases but may be designated and limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of cases, to wit, such land cases as from time to time shall be assigned to the Los Angeles Lands Division office."

Here, the organizational makeup of the Criminal Division, its divisions into various sections, including the Organized Crime Section to which Mr. Padgett belonged, and over which the Assistant Attorney General presides, provides the designation that the *Hall* case would require.*

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* Courts have previously upheld the authority of Departmental or Special Attorneys to appear before grand juries. See *United States* v. *Morse*, 292 F. 273 (S.D.N.Y., 1922); *United States* v. *Martins*, 288 F. 991 (D. Mass., 1923); *United States* v. *Amazon*, 55 F.2d 254 (D. Md. 1931); *United States* v. *Powell*, 81 F. Supp. 288 (D. Mo., 1948); *United States* v. *Morton Salt Co.*, 216 F. Supp. 25 (D. Minn., 1962); *United States* v. *Sheffield*, 43 F. Supp. 1 (S.D.N.Y. 1942). But see *United States* v. *Goldman*, 28 F.2d 424 (D. Conn., 1928); *United States* v. *Houston*, 28 F.2d 451 (D. Ohio, 1928); *United States* v. *Cohen*, 273 F. 620 (D. Mass., 1921).

II. The Assistant Attorney General could properly authorize the Department of Justice attorney to appear before the grand jury.

The contention that the Attorney General could not delegate his power to assign government attorneys to the grand jury to the Assistant Attorney General in charge of the Criminal Division is answered by Judge Werker's opinion in *Crispino, supra*. Section 510 of Title 28 permits the Attorney General to delegate any of his functions to "any other officer" of the Department of Justice. By regulation, 28 C.F.R. 0.60 and 0.55, the Attorney General delegated his power to designate attorneys to present evidence to grand juries in all cases "assigned to, conducted, handled, or supervised by the Assistant Attorney General in charge of the Criminal Division" to the Assistant Attorney General. This includes prosecution of all federal crimes not otherwise specifically assigned. It included the coordination of enforcement activities against organized crime and racketeering. See *May* v. *United States, supra*, 236 Fed. at 499; see also *United States* v. *Twining, supra*, 132 Fed. at 130.*

As Judge Werker concluded in *Crispino* (slip opinion pp. 4-5):

> It thus appears that the power to appoint Special Attorneys was properly delegated to Mr. Peterson.

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* Contrary to appellant's contention, apart from 28 C.F.R. 0.60 which gives the Assistant Attorney General specific power to designate attorneys to appear before grand juries, the general authority given to him under 28 C.F.R. 0.55 to prosecute all federal crimes embraces the power to assign attorneys to the grand jury.

In *Twining*, the Court noted, "It is not necessary that an appointment of a special assistant to a district attorney shall be drawn up with the technical accuracy required in pleadings and other legal documents" (*United States* v. *Twining, supra* at 132).

> This is not a case of improper delegation as was found in *United States* v. *Giordano,* 416 U.S. 505 (1974). That case involved a question of delegation of power to authorize wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Section 2516(1) of that act allows the Attorney General or any Assistant Attorney General to authorize the application. The official who authorized the wiretap in *Giordano* was in fact the Executive Assistant to the Attorney General. The Court concluded that despite the broad delegation provision in 28 U.S.C. § 510, Congress in enacting § 2516(1) "intended to limit the power to authorize wiretap applications by the Attorney General himself and to any Assistant Attorney General he might designate." 416 U.S. at 514. In enacting section 515(a) . . . there was no limitation imposed on the Attorney General's ability to delegate his power of appointment of Special Attorneys to other officers of the Department of Justice such as Mr. Petersen. (Footnote omitted).

Nor is it necessary that the letters of appointment contain a statement that the assignment of a particular attorney is at the direction of the Deputy Attorney General. The regulations give the Assistant Attorney General power to act, without first receiving approval from the Deputy Attorney General.

In short, there is no substance to the claim of improper delegation.

POINT IV

Having failed to move under Fed. R. Crim. P. 12(b)(2) for dismissal of the indictment, Eliano cannot raise the claim on appeal.

Appellant's attack on the validity of the indictment and the institution of this prosecution based on Mr. Padgett's allegedly unauthorized appearance before the grand jury which returned the indictment is made for the first time on this appeal. No motion was made in the trial court asserting this claim. The failure to do so precludes review in this Court. Fed. R. Crim. P. 12(b)(2); *Davis* v. *United States*, 411 U.S. 233, 242 (1973); see also *United States* v. *Papadakis*, *supra*, slip op. at 1254; *United States* v. *Wilson*, 434 F.2d 494, 496 (D.C. Cir. 1970); *Sewall* v. *United States*, 406 F.2d 1289, 1292 (8th Cir. 1969); *Grogan* v. *United States*, 394 F.2d 287, 289 (5th Cir. 1967), *cert. denied*, 393 U.S. 830 (1968); *United States* v. *Solomon*, 216 F. Supp. 835, 836-37 (S.D.N.Y. 1963) and the cases cited therein.

As Judge Werker pointed out in his memorandum decision filed March 25, 1975 in *United States* v. *Crispino*, 74 Cr. 932 (S.D.N.Y.) at p. 4:

> "A motion to dismiss an indictment based upon the presence of an unauthorized person before the grand jury must be made prior to trial or it is waived. *See* Advisory Committee Note to Rule 12 of the Federal Rules of Criminal Procedure." (footnote omitted).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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LAWRENCE S. FELD,
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Of Counsel.

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

STEVEN K. FRANKEL deposes and says that he is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 4th day of April, 1975 he served a copy of the within ELIANO'S BRIEF by placing the same in a properly postpaid franked enveloped addressed:

McCoyd and Keegan
1000 Franklin Ave.
Garden City, New York

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Steven K. Frankel

Sworn to before me this

4th day of April, 1975

William I. Aronwald

WILLIAM I. ARONWALD
Notary Public, State of New York
No. 4505939
Qualified in Rockland County
Commission Expires March 30, 19[illegible]